

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324c Proceeding
) Case No. 94C00084
JAVIER MORALES-VARGAS,)
Respondent.)
_____)

MODIFICATION BY THE CHIEF
ADMINISTRATIVE HEARING OFFICER OF THE
ADMINISTRATIVE LAW JUDGE'S DECISION

On February 14, 1995, the Honorable Marvin H. Morse, the Administrative Law Judge (ALJ) assigned to United States v. Morales-Vargas, issued a Final Decision and Order in favor of the complainant in a document fraud case brought under 8 U.S.C. § 1324c. The decision, based upon a factual stipulation submitted by the parties, found, as charged in Count II of the complaint, that the respondent knowingly used a forged alien receipt card and a fraudulent social security card in order to gain employment in violation of 8 U.S.C. § 1324c(a)(2).¹ The ALJ's decision dismissed Count I of the complaint in light of United States v. Remileh, 5 OCAHO 724 (1995), a recent Chief Administrative Hearing Officer (CAHO) decision which held that providing false information on an Immigration and Naturalization Service (INS) employment eligibility verification form (Form I-9) does not constitute a violation of section 1324c.

¹ This provision was enacted as section 274C(a)(2) of the Immigration and Nationality Act (INA) and codified at 8 U.S.C. § 1324c(a)(2) (1994). It provides that:

It is unlawful for any person or entity knowingly-

. . . .

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered or falsely made document in order to satisfy any requirement of this Act,

On February 22, 1995, the respondent filed a request for administrative review with the CAHO pursuant to 28 C.F.R. § 68.53(a)(1).² Pursuant to the Attorney General's authority to review an ALJ's decision and order, as provided in 8 U.S.C. § 1324c(d)(4), and delegated to the CAHO in section 68.53(a) of 28 C.F.R.; it is necessary, upon review, to modify the ALJ's February 14, 1995, order for the reasons set forth below.

Procedural Background

According to the Second Prehearing Conference Report and Order signed by the ALJ on September 15, 1994, both counsel had "agreed that no evidentiary hearing is needed and the issues present only questions of law, and not of fact." To that end, an Agreed Statement of Facts and Legal Issues signed by both parties on November 18, 1995 [hereinafter stipulations], was accepted by the ALJ to serve as the basis of the filing of briefs setting forth "their positions and argument[s] on the merits of the legal issues in the case." (ALJ Report and Order)

After submission of briefs arguing the merits of the legal issues, the ALJ issued the final decision and order on February 14, 1995. The pertinent portion of the ALJ's Ultimate Findings, Conclusions and Order provides as follows:

2. that, as agreed by the parties, Respondent possessed, used, and attempted to use the forged documents listed in Count II of the Complaint for the purpose of satisfying a requirement of the INA, in violation of 8 U.S.C. § 1324c;

(ALJ order at 3) (emphasis added)

However, the brief which accompanied respondent's request for review challenged the accuracy of that finding:

Respondent's case before Judge Morse was presented based solely upon a factual record stipulated to by the parties. Contrary to the judge's decision an[sic] page 3, paragraph III.2., the parties at no time agreed that Mr. Morales had "possessed, used, and attempted to use the forged documents listed in Count II of the Complaint for the purposes of satisfying a requirement of the INA." To the contrary, Mr. Morales submitted substantial arguments in his brief that his actions did not constitute an offense chargeable under INA § 274C.
(Respondent's brief at 2)

² Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)).

Respondent's brief is technically correct in that the parties did not literally agree that the respondent committed the document fraud alleged in Count II "for the purpose of satisfying a requirement of the INA."³ However, the parties did stipulate that,

9. Respondent knew the fraudulent Resident Alien Receipt Card and fraudulent Social Security card he provided as proof of employment eligibility were fraudulent.

10. Respondent possessed and used the fraudulent Resident Alien Receipt Card and fraudulent Social Security card knowing that he might be required to present such documents in order to obtain employment.

In other words, the respondent was using fraudulent documents in order to circumvent the employment eligibility verification requirements of the employer sanctions statute.⁴

As noted, the ALJ's finding does not specifically track the parties' agreement. Stipulations 9 and 10 concede that the respondent knowingly possessed and used fraudulent documents in order to complete the employment eligibility verification process and thereby obtain employment. The stipulations do not concede the legal point that respondent's actions were undertaken for the purpose of satisfying a requirement of the INA. Thus, the ALJ's order does not explicitly find as a matter of law that the facts stipulated to by the parties constitute a violation of section 1324c(a)(2), but rather, the order erroneously concludes that the parties had agreed on that legal issue.

The purpose of this order is to modify the ALJ's finding to the extent that it technically misstates the agreement of the parties and to explicitly make a finding that the facts to which the parties did stipulate, constitute a violation of section 1324c(a)(2) as a matter of law.

Establishing Liability

In order to establish a violation of 8 U.S.C. § 1324c(a)(2), the complainant must have shown that 1) the respondent used the forged, counterfeit, altered or falsely made documents, 2) knowing the documents to be forged, counterfeit, altered or falsely made 3) after

³ As will be discussed in some detail below, the "purpose" phrase quoted from the ALJ's ultimate finding is one of the elements which must be established to find a violation of section 1324c(a)(2).

⁴ The employer sanctions statute was enacted as part of the Immigration Reform and Control Act of 1986 (IRCA); written as an amendment to the Immigration and Nationality Act, specifically, section 274A of the INA; and codified at 8 U.S.C. § 1324a.

November 29, 1990,⁵ and 4) for the purpose of satisfying any requirement of the INA. The factual stipulations as filed by the parties contain sufficient proof to conclusively establish the first three elements of a section 1324c(a)(2) violation.

As to the first requirement that the respondent used the allegedly forged, counterfeit, altered or falsely made documents, stipulations 6, 7, and 8 are sufficient to conclusively establish this element.

6. Respondent signed section one of the Employment Eligibility Verification Form I-9 on November 2, 1993.

7. At the time of hire, Respondent presented Omnisea, Inc. with a fraudulent Resident Alien Receipt Card, A90-357-456, as proof of identity and employment eligibility.

8. At the time of hire, Respondent presented Omnisea, Inc. with a fraudulent Social Security card #546-87-6343 as proof of employment eligibility.

Stipulations 9 and 11 conclusively establish the second element: that the respondent knew the documents were fraudulent.

9. Respondent knew the fraudulent Resident Alien Receipt Card and fraudulent Social Security card he provided as proof of employment eligibility were fraudulent.

11. Respondent purchased the fraudulent Resident Alien Receipt card and Social Security card on the street in Los Angeles in 1990 and paid \$150.00 for them.

As to element three, that these events took place after the time of enactment of 8 U.S.C. § 1324c, stipulations 4 and 6 place the events after November 29, 1990.

4. Respondent was hired for employment by Unisea, Inc. on or about November 2, 1993.

6. Respondent signed section one of the Employment Eligibility Verification Form I-9 on November 2, 1993.

However, it is the fourth element, that the respondent presented these documents for the purpose of satisfying any requirement of the INA, which has been disputed by the respondent. See Respondent's brief at 2. In summary, the respondent's brief contains the argument that 8 U.S.C. § 1324a, which codifies the employment eligibility verification system, does not impose any duties upon the employee,

⁵ Section 1324c was enacted on November 29, 1990, as part of the Immigration Act of 1990, Pub. L. No. 101-649, and is applicable to violations on or after November 29, 1990.

only upon the employer. See Respondent's brief at 4-10. Accordingly, the respondent contends that providing false documents to an employer to prove employment eligibility would not constitute a violation of any duty imposed as a "requirement of this Act" [the INA], and thus does not fulfill the "purpose" element of section 1324c(a)(2).

The respondent correctly summarizes the historical, underlying aim of section 1324a as deterring illegal immigration into the United States by those in search of employment by imposing upon employers a duty to verify the employment eligibility of employees. See Respondent's brief at 7-8. See also United States v. Villatoro-Guzman, 3 OCAHO 540 (1993). However, by 1990 Congress concluded that the employer sanctions provisions were not having the desired effect of reducing the "magnet" of U.S. jobs as an inducement to illegal immigration, chiefly because of "the large numbers of false documents that now exist which can be used to fraudulently satisfy the employment authorization requirement of employer sanctions;" and that enactment of the provision which was ultimately codified as 8 U.S.C. § 1324c was needed as a deterrent to the resultant document fraud. Remileh, 5 OCAHO 724 at 6, citing 136 Cong. Rec. S13629 (Sept. 24, 1990). Accordingly, the document fraud provisions of section 1324c have been linked to the employment verification requirements of section 1324a since their enactment.

Section 1324a(b)(1) requires that an employer must attest, under penalty of perjury on a form designated by the Attorney General, that an employee is not an unauthorized alien by examining a legally acceptable document or combination of documents which enable the employer to establish and verify the employee's identity and work eligibility.⁶ Given this framework, it is clear that section 1324a liability for failure to properly verify identity and employment eligibility rests on the employer, including failure to ensure that the employee properly completes the employee portion of the employment eligibility verification form (Form I-9). See 8 U.S.C. § 1324a(b)(2) and 8 C.F.R. § 274a.2(b)(1)(I). However, it is inconceivable that these statutory requirements could be satisfied unless the employee produces a legally acceptable document or combination of documents. At the very least, section 1324a implicitly imposes a requirement on the employee to provide valid documents to an employer as part of the verification process.

⁶ Documents establishing employment authorization, identity, or both are listed in the statute itself at section 1324a(b)(1), as well as in INS implementing regulations at 8 C.F.R. § 274a.2(b)(1)(v).

In any event, section 1324c(a)(2) prohibits document fraud undertaken "in order to satisfy any requirement" of the INA (emphasis added). It does not say any requirement of the INA imposed upon the person or entity that commits document fraud, nor does it say any requirement which the person or entity who commits document fraud must meet in order to gain a benefit or avoid a liability under the INA. It simply refers to any requirement of the INA, without exception.⁷ Thus, the issue in this case is not whether the verification requirements should be characterized as those of the employer or of the employee. The fact is that the actions of both the employer and the employee in the verification process are undertaken to satisfy a requirement of the INA.

Even if the verification requirement is characterized as exclusively that of the employer, the actions of an employee in presenting fraudulent documents are undertaken to satisfy that requirement and thus gain illegal employment. As stated in Remileh, "In relation to the employment eligibility verification system, the document fraud provisions of section 1324c are supplemental in that they require (when stated in the affirmative) that the employee only use validly issued identification or work authorization documents for these purposes." 5 OCAHO 724 at 3. The document fraud provisions of section 1324c provide a means of imposing a civil penalty on those employees who attempt to circumvent the employment eligibility verification system through the use of fraudulent documents.

Conclusion

In light of the discussion concerning the legal issues surrounding the "purpose" requirement of section 1324c(a)(2), I conclude that the respondent did submit the fraudulent documents in order to satisfy a requirement of the INA. The respondent admits in stipulated facts 9 and 10 that the fraudulent documents were possessed and used in order to complete the employment eligibility verification process and gain employment. See supra page 3. The fact that the respondent submitted the documents knowing that their submission was required in order to gain employment by providing proof of identity and employment eligibility is in law sufficient to satisfy the fourth element of a violation of section 1324c(a)(2)- that the documents were submitted "in order to satisfy any requirement of the Act." As stated in Remileh,

⁷ Similarly, paragraphs (1) and (3) of section 1324c(a) refer to "a requirement" of the Act, also without restriction.

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"It is the underlying fraudulent document, submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. § 1324a." 5 OCAHO 724, at 3.

ACCORDINGLY, it is hereby found that:

1. the respondent knowingly possessed, used, and attempted to use the forged documents listed in Count II of the complaint for the purpose of satisfying a requirement of the INA, in violation of 8 U.S.C. § 1324c(a)(2);
2. the allegation in Count I of the complaint is dismissed for failing to state a claim upon which relief can be granted;
3. the respondent is ordered to pay a civil money penalty in the amount of \$500.00 (\$250 for each violation listed in Count II); and
4. the respondent is ordered to cease and desist from violating § 274C(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324c(a)(2).

It is **SO ORDERED** this 13th day of March, 1995.

JACK E. PERKINS
Chief Administrative Hearing Officer

UNITED STATES DEPARTMENT OF JUSTICE
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OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324c Proceeding
)	Case No. 94C00084
JAVIER MORALES-VARGAS)	
a/k/a DANIEL AVASOLOS-)	
VELASQUEZ,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER
(February 14, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Zsa Zsa DePaolo, Esq.
for Complainant

Jay W. Stansell, Esq.
for Respondent

I. Procedural History

On April 28, 1994, the Immigration and Naturalization Service (Complainant or INS) filed its Complaint in this case in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint is based on an underlying INS Notice of Intent to Fine (NIF) alleging that Javier Morales-Vargas (Respondent or Morales-Vargas) committed document fraud in violation of § 274C of the Immigration and Nationality Act (INA), P.L. 101-649, codified at 8 U.S.C. § 1324c.

Count I of the Complaint alleges that Respondent knowingly forged one INS employment eligibility verification Form I-9 (Form I-9) dated November 2, 1993 in the name of Daniel A. Vasquez. The civil money penalty assessed for Count I is \$250.00. Count II alleges that Respondent, for the purpose of satisfying a requirement of the INA,

knowingly used the two forged documents: (1) a resident alien receipt card and (2) a social security card. The civil money penalty assessed for Count II is \$500.00 (\$250.00 for each violation).

On June 21, 1994, counsel for Morales-Vargas timely filed an Answer to the Complaint which denied the allegations in Counts I and II. The Answer also included seven affirmative defenses, the crux of which were that the act of filling out a Form I-9 is not a violation of § 1324c since only the use of fraudulent documents constitutes a violation.

On August 19, 1994, a telephonic prehearing conference was held at which the parties agreed to file factual stipulations and a statement of legal issues. During a second telephonic prehearing conference, the parties agreed to submit the entire case for decision on the basis of the documents filed. The stipulations submitted by the parties on November 18, 1994¹ contain an undertaking by which Respondent admits to knowingly presenting a fraudulent Resident Alien Receipt Card and Social Security card for the purpose of complying with § 1324a's requirement that employers fill out a Form I-9 for all employees. The legal issues identified by the parties turn on whether filling out a Form I-9 constitutes falsely making a document within the meaning of § 1324c.

As Respondent's concurrence in the stipulations necessarily concedes to the allegations of Count II that he used a fraudulent Resident Alien Card and Social Security Card to obtain employment, the only remaining issue is the one identified by the parties in their filings, i.e., whether the Form I-9 is a document which, when filled out by an alien and/or employer with the alien using fraudulent documents, qualifies as a violation under 8 U.S.C. § 1324c.

II. Discussion

Although the parties have briefed the issue of whether filling out a Form I-9 constitutes a violation of § 1324c, there is no need to analyze

¹ Although the stipulations and legal issues were not signed by counsel for Respondent, they were later adopted by Respondent in a filing denominated "Respondent's Brief," dated December 30, 1994. Respondent's Brief included arguments on the legal issues. In response, Complainant also filed a brief on January 9, 1995 which sets out Complainant's arguments on the legal issues identified. This was followed by Complainant's Motion to Allow Late Filing of Complainant's Brief and Motion to Amend the Complaint. The correction was sought for a mistake in Count I, paragraph A and Count II, paragraph A to reflect the correct name of Respondent and the correct documents. The allegations contained in the Complaint, however, are not affected by this correction.

their arguments as this question has recently been answered in the case of United States v. Remileh, 5 OCAHO 724 (1995) (Modification by the Chief Administrative Hearing Officer (CAHO) of Administrative Law Judge's Order).² In Remileh, the CAHO held that "the attestation of an employee to false information on a Form I-9 does not constitute the creation of a 'falsely made' document in violation of 8 U.S.C. § 1324c." Id. at 3. Accordingly, the CAHO dismissed that portion of the charges against the respondent. Whether or not that disposition was inevitable and whether or not INS had an opportunity to brief the issue, I am bound by Remileh. Therefore, because the case before me is on all fours with Remileh, I am obliged to follow its lead. For that reason,

Count I of the Complaint must be dismissed in favor of Respondent on the grounds that Complainant has failed to state a claim upon which relief can be granted.³

III. Ultimate Findings, Conclusions, and Update

I have considered the Complaint, Answer, briefs and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude the following:

1. that the allegation in Count I is dismissed for failing to state a claim upon which relief can be granted;
2. that, as agreed by the parties, Respondent possessed, used, and attempted to use the forged documents listed in Count II of the Complaint for the purpose of satisfying a requirement of the INA, in violation of 8 U.S.C. § 1324c;
3. that Respondent pay a civil money penalty in the amount of \$500.00 (\$250 for each violation listed in Count II);
4. that Respondent cease and desist from violating § 274C(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324c(a)(2).

² Because of its recency, Remileh is not yet generally available to the public. For convenience of the parties, a copy is forwarded in conjunction with each copy of this Final Decision and Order.

³ Respondent's fifth affirmative defense recites that "the Complainant fails to state a claim against him in that the acts complained of in Count I are not prohibited by § 274C. . . ." Answer at 4.

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This Final Decision and Order Granting Complainant's Motion for Summary Decision "shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney general shall become a final order. . . ." 8 U.S.C. § 1324c(d)(4).

"A person or entity adversely affected by a final order under this section may, within 45 days after the date of the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324c(d)(5).

SO ORDERED.

Dated and entered this 14th day of February, 1995.

MARVIN H. MORSE
Administrative Law Judge